United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1327

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1327

UNITED STATES OF AMERICA,

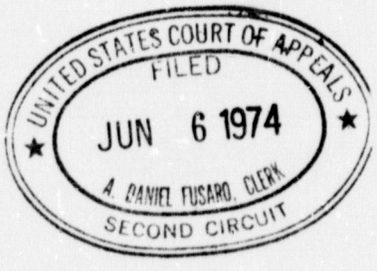
Appellee,

—against—

VINCENT PACELLI, JR., et al.,

Appellant.

BRIEF FOR APPELLANT VINCENT PACELLI, JR.



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UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

No. 74-1327

UNITED STATES OF AMERICA,

Appellee

Vs.

VINCENT PACELLI, JR.,

Appellant

BRIEF FOR APPELLANT PACELLI

STATEMENT OF THE CASE

Defendant Pacelli was tried below, along with four other defendants, on indictment 73 CR. 881, which charged thirteen defendants with conspiring to violate the narcotics laws from January 1, 1971 to September 20, 1973 (Count 1). Defendant was also charged with six substantive counts involving distribution of cocaine and heroin.

Trial was before Judge Milton Pollack and a jury. At the close of the Government's case, Judge Pollack dismissed one of the substantive counts (Count 4), (1299).* The jury ultimately convicted defendant Pacelli on the conspiracy count and two of the remaining substantive counts (2 and 6) and

* Reference is to trial transcript

found him not guilty on three substantive counts (3, 5 and 7) (1774).

On March 15, 1974, Judge Pollack sentenced Pacelli to fifteen years on each of counts 1, 2 and 6, concurrent with each other but consecutive to a twenty year sentence imposed by Judge Pollack in 71 CR. 614 on May 22, 1972 (A. 189).**

Judge Pollack also fined defendant $75,000 plus costs of prosecution and imposed three years special parole following the thirty-five year prison term.

STATEMENT OF FACTS

Background

The trial below was defendant's sixth trial in the Southern District within a period of less than two years, and based on conduct allegedly occurring between April, 1971 and February 4, 1972, a period of ten months.

The first trial, also before Judge Pollack (71 CR. 614) took place in February, 1972. Defendant was convicted of a narcotics conspiracy and of two substantive narcotics counts. The judgment and Judge Pollack's twenty-year sentence was affirmed by this Court. United States v. Pacelli, 470 F. 2d 67 (2d Cir. 1972).

During the trial of the foregoing case, the body of Patsy Parks was discovered on Long Island and Pacelli's bail was revoked on February 10, 1972. He has been in jail or prison ever since.

Pacelli's second trial was in June, 1972, on indictment 72 CR. 664 (A. 82), where he was again charged with a narcotics conspiracy and substantive violations. Judge Lee Gagliardi presided. The chief witness against Pacelli in that case was Barry Lipsky. On June 16, 1972, the following testimony was

** Reference is to Appendix of Appellant Pacelli

elicited from Lipsky by assistant United States Attorney Gerald Feffer:

Q. Mr. Lipsky, have any promises of any type been made to you from any governmental authority, federal, state, local, with respect to your testimony here in court today?

A. On this case, sir?

Q. Yes.

A. None whatsoever, sir. Nothing whatsoever has been promised or told to me in any way whatsoever at all.

***

Q. Do you expect to receive any favorable treatment in any way, shape or form from your testimony here today?

A. I have no way of knowing that, sir. I know I am indicted, on trial here for doing what is allegedly I have done.

***

A. I do not expect to receive any favorable treatment for doing what I have done, by testifying here... (422-423)

Defendant was convicted, sentenced to fifteen years in prison, and appealed.

While the appeal of the conviction in 72 CR. 664 was pending, Parelli was taken to trial in December, 1972, on a third narcotics indictment, also before Judge Gagliardi (A. 82). Again, Lipsky was the principal Government witness. Again, Lipsky denied receiving any consideration or promises from the Government (418). This time, however, defense counsel disclosed to the court tape-recorded conversations between Assistant United States Attorney Feffer, Walter Gwinn, Lipsky's attorney, and Lipsky wherein Lipsky was promised by Feffer, on April 11, 1972, two months before the previous trial, that he would never be prosecuted for "any information that comes out of his mouth, this case or any other case" (A. 56). Feffer agreed with Gwinn that Lipsky had a "contract [of] complete transactional immunity" (A. 57), and

Gwinn told Lipsky he had a "verbal contract with the Government" (A. 54), and wouldn't be prosecuted for "any damn thing" (A. 55).

As a result of these disclosures, the Government requested that 72 CR. 664 be remanded to the trial court, which request this court granted.[1] Ultimately, a mistrial was declared in the case then on trial, 72 CR. 1319, and the judgment was vacated in 72 CR. 664.

Defendant's fourth trial was in May, 1973, before Judge Tenney, on an indictment charging Pacelli with conspiracy to deprive Patsy Parks of her civil rights by killing her. Again, Lipsky, the alleged co-conspirator, was the principal witness against Pacelli. Convicted and sentenced to a life term consecutive to the twenty year sentence he received on 71 CR. 614, Pacelli appealed. On January 11, 1974 this court reversed the civil rights conviction on the ground, inter alia, that the Government had failed to disclose valuable Jencks Act material. United States v. Pacelli, 491 F. 2d 1108 (2d Cir. 1974).

While the civil rights appeal was pending, Pacelli was tried twice more.

The fifth trial was in July, 1973, on 73 CR. 441, also before Judge Pollack, where defendant was tried, along with sixteen other defendants, for essentially the same charges which make up the indictment below. After two and a half weeks of trial, Judge Pollack severed Pacelli because he was needed as a witness for several co-defendants.

The sixth trial was the one below.

STATEMENT OF FACTS

The theory of the conspiracy count in the indictment was that a complex organization engaging in heroin and cocaine distribution existed from January

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1 The appeal of Pacelli's conviction was docketed in this Court as no. 72-1369

1, 1971 to the date of the indictment, September 20, 1973, and that at or near the top of the heroin suppliers was Herbert Sperling and defendant Mallah, whereas defendant Pacelli was high in the hierarchy of cocaine suppliers (10). The link between the alleged heroin suppliers (the "Sperling group") and the cocaine suppliers (the "Pacelli" group) consisted of the fact that one group sometimes sold its products to the other.

The evidence with respect to defendant Pacelli fell short of the Government's theory of a huge conspiracy. Only two witnesses implicated Pacelli. Barry Lipsky swore that in April, 1971, he was employed by Pacelli to guard Pacelli's narcotics in a Third Avenue apartment (57-63). Thereafter, Lipsky said, he learned to test cocaine and heroin (71-80), and began making deliveries for Pacelli (80). With respect to each substantive count, he testified essentially as follows:

Count 2 - Sometime between June and September, 1971, Lipsky mixed and delivered, on Pacelli's orders, two kilos of heroin to defendant Catino and John Fazzalari (118) (The jury convicted).

Count 3 - In the fall of 1971, Lipsky delivered a kilo of cocaine to defendant DeFranco and Fazzalari (124) (The jury acquitted).

Count 5 - In the summer of 1971, Lipsky went with Pacelli to the Ballentine Barbershop, where Pacelli spoke to Sperling, Mallah and Mileto (87). Thereafter, Pacelli told Lipsky to mix and deliver half a kilo of cocaine to Mileto by putting it in a car supplied by Mileto. Lipsky did as he was told (93) (The jury acquitted).

Count 6 - Sometime in 1971, Lipsky picked up two kilos of heroin from an automobile. Pacelli told Lipsky he had bought the heroin from "Herbie" (131-135) (The jury convicted).

Count 7 - Around Christmas, 1971, Lipsky was with Pacelli when Pacelli bought some cocaine from Negron. Lipsky put it in a Thunderbird, ostensibly for Sperling (145-149) (The jury acquitted).

Lipsky testified to several other similar transactions (102, 109, 113-116, 119, 126, 131-135) and to several visits with Pacelli to the area of the Ballentine Barbershop on Seventh Avenue. Lipsky never met Herbert Sperling (344) or defendant Mallah, but Pacelli pointed them out to him (82, 87, 94); told Lipsky that Mallah was Sperling's partner (94-95). Lipsky also swore that he was present when Pacelli discussed narcotics with Louis Mileto (84-86), who purported to speak for Sperling in promising to "have something for you tomorrow or the next day" (86).

Pacelli's activities ceased with his arrest on February 10, 1972. Lipsky never spoke to him thereafter (258). Lipsky's narcotics activities ended about the same time, since he was arrested for the Parks murder on March 2, 1972 (258). Before his arrest, he had turned all his narcotics and paraphenalia over to Eddie Ramirez (343).

Lipsky was corroborated in part by Susan Weyl. She testified that in November and December, 1971 or 1972 (563), Lipsky used her apartment at 5 E. 9th Street to store "white powder" (560-61). Both Lipsky and Pacelli told her the packages contained heroin and cocaine (561). She saw both of them mixing it (562).

Both Lipsky and Weyl were thoroughly impeached. In addition to evidence of his mental abnormality (493, 499), his long standing use of cocaine (303) and other drugs (321), his persistent perjury, both in Florida (170) and in the Southern District (421-424); his murder charges (187) and hopes for parole (192-193), the inherent incredibility of Lipsky's story was strongly argued. (1511-1516). Moreover, the defense brought out that at a previous trial,

Lipsky had sworn that he and Pacelli had had a narcotics transaction with Luis Valentine in the Yellowfingers restaurant in September, 1971 (346). Lipsky admitted that one could easily see in and out of the restaurant from the street (346). The testimony of a surveilling police officer was then introduced, showing that the officer, though observing Valentine and Lipsky inside a restaurant, did not see Pacelli (1458). The defense argued to the jury that Lipsky did not testify to this transaction in the present trial because he knew his lies would be exposed by the testimony of police officers (1518-20).[2]

Furthermore, when Lipsky was confessing the Parks murder to Nassau County authorities, he swore he had never been engaged in any illegal activities with Pacelli. (357).

Although she denied it (599), Susan Weyl appeared to be on drugs while she was on the stand (1530, 1594). She denied that Lipsky had lived with her (570) or that she had dated him (574), but Lipsky admitted they had dated (370) and told his probation officer he was living with her (369). Weyl also told a friend, called by the defense, that she was living with "Barry" in 1971 (1445). Weyl also admitted that Lipsky had supplied her with cocaine (567), and her story was inconsistent (564, 586).

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2 The jury apparently placed considerable weight on this evidence since they inquired about it during deliberations (1739).

ARGUMENT

Point 1

THE TRIAL OF DEFENDANT PACELLI ON THE INSTANT INDICTMENT VIOLATED HIS RIGHT AGAINST DOUBLE JEOPARDY, HIS RIGHT TO DUE PROCESS OF LAW, HIS RIGHT TO A SPEEDY PROSECUTION, AND WAS CONTRARY TO FUNDAMENTAL FAIRNESS AND EFFICIENT JUDICIAL ADMINISTRATION.

By pre-trial motion, with supporting documents and affidavits, defendant moved to dismiss the indictment on grounds of former jeopardy, violation of Due Process and the right to a speedy prosecution (A. 78). He also claimed that the indictment violated an agreement made in open court between the Government and the defendant. The motion was denied without a hearing (A. 157). It was renewed at trial, at the close of the Government's case (1299) and following the verdict (1776). The grounds for the motion are manifold, and somewhat complex.

1. The conspiracy count

A. Former jeopardy of 71 CR. 614

In 71 CR. 614, upon which defendant was convicted in February, 1972 and sentenced in May, 1972, defendant was charged with conspiring, from January 1, 1971 to June 14, 1971 to distribute narcotics with three named persons and "others unknown" in violation of 21 U.S.C. § 812, 841 (A. 86). He was convicted, and has been serving his sentence since May, 1972. The instant indictment charges the same conspiracy, beginning on the same date, in violation of the same statute. When it is considered that Pacelli has been in jail since February 10, 1972 -- prior to his conviction in 71 CR. 614 -- and there wasn't a grain of evidence below of any conspiratorial

activity by him or his "worker," Lipsky after that date, the similarity of the offenses becomes clear. The only difference between the two charges is that co-conspirators are different and overt acts are different. Surely, however, the Government cannot be permitted to circumvent the Double Jeopardy Clause by the simple expedient of deleting and adding names of co-conspirators or overt acts. Short v. United States, 91 F. 2d 614 (4th Cir. 1937). The substantive offenses allegedly part of the conspiracy charged in 71 CR. 614 occured in May, 1971. The offenses allegedly part of the present conspiracy began before that, in April, 1971 and ended in late 1971. There is, moreover, no evidence in the record that the "agreement" in 71 CR. 614 was separate and distinct from the "agreement" in the present case. Pacelli was charged in 71 CR. 614 with distributing heroin and cocaine with co-conspirators. Assuming arguendo the validity of the theory under which the case below was tried and submitted to the jury -- that persons buying drugs from Pacelli are co-conspirators with persons buying from, selling to, or working for Sperling -- there can be no doubt that all the conspirators charged in 71 CR. 614 could have been jointly tried under the conspiracy count of the present indictment. If the Government had chosen to name the 614 conspirators in the present indictment, and include its 614 proof as well, it manifestly could have done so. Had it not already tried the 614 conspirators, it surely would have done so.[3] It is thus clear that the two conspiracy charges are essentially the same. Braverman v. United States, 317 U.S. 49 (1942); United States v. Mazzochi, 75 F. 2d 497 (2d Cir. 1935); United States v. Cohen, 197 F. 2d 26 (3d Cir. 1952); United States v. Palmero, 410 F. 2d 468 (7th Cir. 1969); United States v. American Honda Motor Co., 271 F. Supp. 979 (N.D.

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3 A comparison of the conspiracy counts in 73 CR. 441 (A. 107) and the present one (A. 115), which the Government admits are the same conspiracy (A. 138), shows that who is named as conspirators and what overt acts are alleged depends entirely upon who is on trial.

Cal. 1967) and 273 F. Supp. 810 (N.D. Ill. 1967).

Even employing the dubious and rigid "same evidence" test, there is double jeopardy here — for the evidence in either 614 or the present case would have been sufficient to convict Pacelli on the other.[4]

Even if different but overlapping periods of time are covered by conspiracies alleged in separate indictments, they may be the same offense; even if different places of conspiracy are alleged, different persons named as co-conspirators, different overt acts alleged. Short v. United States, supra. Here, the place of the alleged conspiracies was the same, the time of one was included in the other, the objects were identical, and the statutes violated were the same. Where, as here, "the Government...merely carved one larger conspiracy into smaller, separate agreements," there is double jeopardy. United States v. Pacelli, 470 F. 2d 70, 72 (2d Cir. 1972). That is what happened here. Cf United States v. Sabella, 272 F. 2d 206 (2d Cir. 1959).

The crime of conspiracy is complete upon the agreement. It is the agreement, not the duration, that constitutes the crime. It will not do, therefore, for the Government to argue that the present conspiracy is different than that in 71 CR. 614 because, although it began on the same date, January 1, 1971, it continued beyond the date alleged in 71 CR. 614 (June 14, 1971). There was neither allegation nor evidence that the agreement in 71 CR. 614 terminated with the date of that indictment, nor that any new, distinct

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4 This argument assumes rejection by the court of the claim that no single conspiracy was proven below, but a minimum of two conspiracies. If the court accepts the two-conspiracy argument, of course, the above claim is undercut somewhat. Still, the evidence against Pacelli in this case would clearly have supported conviction on the conspiracy count in 71 CR. 614, and the evidence in 72 CR. 614 would clearly have supported a conspiracy charge somewhat narrower than the instant charge. In any event, the Government can't have it both ways.

conspiracy was entered into by defendant following his indictment in 71 CR. 614. The presumption that a conspiracy once formed continues, which has been so convenient to the prosecution in this and other cases, precludes any such claim. Moreover, the Government's evidence below clearly shows that Lipsky, in April, 1971, joined an ongoing conspiracy, which continued into February, 1972. That was the same conspiracy for which defendant was convicted in 71 CR. 614. The indictment and the evidence in the present case is mere embellishment of the conspiracy proved in 71 CR. 614. No significant additional facts were needed to prove the conspiracy below than those alleged and proved in 71 CR. 614. Thus, the Fifth Amendment bars this prosecution. United States v. Sabella, supra, at 212.

B. Collateral estoppel -- dismissal of 72 CR. 612

Pacelli was indicted on or about May 12, 1972 in 72 CR. 612 (A. 81). In Count 1 of that indictment, he was charged with conspiring with Barry Lipsky, Peter Aponte, Nicholas Lugo, Albert Perez and "others...unknown" to violate §§ 812, 841 from September, 1971 to May 12, 1972 (A. 89). Manifestly, the conspiracy charged in 72 CR. 612 is the same as the one charged here. (All of the persons named in 72 CR. 612 were either named in the present indictment or the bill of particulars) On motion of Pacelli's attorney in 72 CR. 612, count 1 of that indictment was dismissed on double jeopardy grounds because of its similarity to 71 CR. 614 (A. 82). That ruling of Judge Cagliardi, which was consented to by the Government (A. 82), is binding as res judicata, precluding a trial of the conspiracy count in 72 CR. 612 or any other conspiracy count sufficiently similar to be another version thereof. United States v. American Honda Motor Co., 289 F. Supp. 277 (S.D. Ohio, 1968); Cf Ashe v. Swenson, 397 U.S. 436 (1970). There can be no serious argument that

count 1 of the present indictment is different from count 1 of 72 CR. 612. Accordingly, collateral estoppel bars further prosecution.

C. Former Jeopardy -- 73 CR. 441

Defendant was indicted and tried in the Sperling case, 73 CR. 441, which the Government admits constituted the same charge as that in the present indictment (A. 138). The identity of the conspiracy counts is plain (A. 107, 115). The Government relied below on the simple claim that since Pacelli's attorney had moved for and the court granted a mistrial in the Sperling case, he had waived jeopardy (A. 140). That does not suffice.

Prior to the trial of 73 CR. 441, Pacelli moved for a severance. He also executed an affidavit to the effect that he would give exculpatory testimony on behalf of two of his co-defendants if he was tried separately and his case disposed of first, but that he would not otherwise testify (A. 84, 85). His severance motion was denied and he was put to the anguish and expense of nearly three weeks of trial. Than and only then, was a severance granted (A. 85).

Where a mistrial is "granted in the sole interest of the defendant," the Double Jeopardy Clause may permit reprosecution Gori v. United States, 367 U.S. 364 (1961). Here, however, the mistrial was plainly not granted for defendant's benefit. In support of his motion below, Pacelli stated in his affidavit that he had been informed that the mistrial "was granted as a result of an ex parte request made to the Judge by the Assistant United States Attorneys, who requested that I be mistried because if I were not, they could not sustain on appeal the anticipated convictions of Frank and Antionette Massi" (A. 85). These allegations were not denied by the Government below.

The present case is thus analogous to Downum v. United States, 373 U.S. 734 (1963) where a mistrial at the Government's request, because of an unavailable witness, was held to bar retrial. The interests served by the mistrial were not the defendant's. The mistrial was not granted because of any prejudice in the proceedings with respect to him, but in order to make his evidence available to other defendants and to thus protect the Government's case on appeal. Defendant's rights were therefore sacrificed for someone else's, in their interest, not in his. The case is therefore governed not only by Downum, but by United States v. Jorn, 400 U.S. 470 (1971), where the mistrial was declared to protect witness's constitutional rights. Holding that jeopardy attached, the Court said:

> ...the judge's insistence on stopping the trial until the witnesses were properly warned [of their rights] was motivated by the desire to protect the witnesses rather than the defendant. But the Government appears to view the question of benefit as turning on an appellate court's post hoc assessment as to which party would in fact have been aided on the hypothetical fact that the witnesses had been called to the stand after consulting with their own attorneys [as to thier rights]. That conception of benefit, however, involves nothing more than pure speculation. In sum, we are unable to conclude on this record that this is a case of a mistrial in the sole interest of the defendant.

Not only was the mistrial as to defendant done in the Government's interest and at its request, a mistrial would not have been required had the Court not committed pre-trial error. The grounds upon which the severance was required were made plain in pre-trial motions and affidavits. Nonetheless, the court compelled defendant to shoulder the expense, risk and delay of almost three weeks of trial before severing him. This was clearly not in defendant's "sole interest."

The only argument even plausibly open to the Government is waiver. Defendant's counsel did consent to a mistrial, but only after the following

colloquy (from p. 3552 of the Sperling transcript):

> The Court: All right. Let me ask you this question and how would the defendant's counsel consider this: suppose, as they have done in a prominent case in Washington, that there is use immunity given to Mr. Pacelli at the present time for his testimony in this case on direct and cross-examination and then he is severed out of the case. How would that work?
>
> Mr. Balliro: Of course that is a matter I would have to agree with. It is consistent with my contingent motions for a mistrial and severance during the course of the trial.
>
> The Court: Would you agree that Mr. Pacelli would take the witness stand to be examined and cross-examined with the understanding that he be severed from the case immediately after his testimony?
>
> Mr. Balliro: Severed from his jury?
>
> The Court: Yes
>
> Mr. Balliro: Yes
>
> The Court: Would you agree to that?
>
> Mr. Balliro: Yes (A. 13)

According to Pacelli's uncontroverted affidavit below, he understood from this colloquy that he was being granted use immunity (A. 14). The understanding was a reasonable one, especially for a layman. Moreover, Pacelli swore, again without contradiction, that shortly after testifying in the Sperling trial, his attorney "explained to me that one of the reasons he had agreed to have me testify was that I had received immunity" (A. 14).

In the Court below, however, when defendant moved to dismiss the indictment and suppress evidence tainted by his testimony in the Sperling trial, Judge Pollack peremptorily denied the motion, saying "there is neither factual or legal merit to [the] suggestion" that defendant testified "under a justifiable belief that he was testifying with use immunity" (A. 143).

However, since the defendant believed, and was told by his attorney, that he received use immunity, any "consent" to a mistrial was plainly uninformed and invalid. Furthermore, even where defendant intelligently consents to a mistrial, jeopardy is not waived if the necessity for the consent is occasioned by judicial or prosecutorial impropriety. United States v. Jorn, supra, fn. 12. In this case, there was judicial error both in denying the pre-trial motion for severance and in leading defendant and his attorney to believe immunity was being granted.

Finally, there was no consent by the defendant (A. 14). While defendant's counsel consented to the mistrial, defendant did not. Waiver of the Constitutional protection against former jeopardy cannot be made by counsel alone. "[N]o stipulation of counsel waiving his client's constitutional rights could be effective without the client's specific assent. In absence of express authority, an attorney has no authority to surrender substantial legal rights of his client." Himmelfarb v. United States, 175 F. 2d 924, 931 (9th Cir. 1949). "The mere silence of an accused or his failure to object or to protest a discharge of the jury cannot amount to a waiver of this immunity [against double jeopardy]." Id. at 931, n. 1.

2. Substantive counts

A. Violation of Due Process

Defendant was charged and convicted below on two substantive counts, both resting solely on the testimony of Lipsky.[5] Count 2 charged a distribution of heroin to Catino in September, 1971. Count 6 alleged possession of heroin in November, 1971. The evidence of these charges - Lipsky's testimony - was in the possession of the Government since March, 1972 (351),[6] a year and a half before the present indictment. These charges could have been included in any of the four previous indictments (72 CR. 612, 72 CR. 664, 72 CR. 1319, 73 CR. 441) of defendant which were predicated upon Lipsky's testimony. Count 2, however, was newly prepared for the present trial. Count 6 appears to be the same as Count 9 on which Pacelli was tried in the Sperling case (A. 113, 119).[7] It was not alleged or tried in any of the three earlier indictments. A number of sound and well established principles were violated by the trial of Pacelli on these counts.

This is the fifth time in less than two years that the Government has trotted out the same witness, Lipsky, in an effort to convict defendant and enhance the twenty-year sentence he is already serving. During this entire

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5 Virtually all arguments made herein apply with equal force to the counts in the present indictment which were dismissed or upon which Pacelli was acquitted. Since those claims are now moot, appellant will confine his analysis, for the most part, to the counts upon which he was convicted, in the interest of simplification.

6 The Government even had Lipsky's full story about Pacelli's relationship with Sperling and Mileto at least as early as May 4, 1972 (G. EX. 3527). Indeed, it appears from the taped conversations between Feffer and Gwinn, that Lipsky's claims concerning Pacelli were known to Judge Pollack at the time he sentenced Pacelli in 71 CR. 614. See Affidavit of bias and prejudice; A. 34, 35, 48, 72.

7 The former jeopardy argument in 1. C supra, relating to the conspiracy count, therefore applies with at least equal force to Count 6.

period of time, defendant has been in jail and hasn't committed so much as a misdemeanor. What he has done is simply to assert his constitutional rights and manifest a proclivity for not giving up. In the process, he embarrassed the office of the United States Attorney because he produced irrefutable proof that at least one of the Assistant United States Attorneys had knowingly elicited perjury against him, and the entire office had failed to disclose the perjury for five months after its occurrence.[8]

As a result of the disclosures, defendant's conviction in 72 CR. 664 was set aside and a mistrial was declared in 72 CR. 1319. Instead of retrying those charges, however, the Government brought the present indictment. This was a violation of the principle of North Carolina v. Pearce, 395 U.S. 711 (1969). In Pearce, which dealt with the legality of enhancing sentences on retrial, the court said:

> A defendant's exercise of a right to appeal must be free and unfettered. ....[I]t is unfair to use the great power given the court to determine sentence to place a defendant in the dilemma of making an unfree choice....Due Process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he

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8 As the record plainly shows, Assistant United States Attorney Feffer wilfully and knowingly elicited and relied upon Lipsky's perjury in 72 CR. 664. (422). Indeed, the very day he made a "verbal contract of immunity" with Gwinn and Lipsky, Feffer took Lipsky in the grand jury and had him testify that anything he said could be used against him and that he might be indicted on his testimony (412). Despite Feffer's statement to Gwinn that the immunity offer was from the "Chief" (A. 49) and that he was speaking "from the head office here" (A. 50) the Government opposed defendant's motion for a new trial in 72 CR. 664, submitted a brief on appeal, and was prepared to argue he had a fair trial, five months after his conviction.

> receives after a new trial. And since fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be free of apprehension of such a retaliatory motivation on the part of the sentencing judge. 395 U.S. at 725.

The Pearce principles apply with equal force to prosecutorial vindictiveness in the charging process. As this Court said in U.S. ex rel Williams v. McMann, 436 F.2d 103 (2d Cir. 1970), cert. den. 402 U.S. 914:

> ...prosecutorial vindictiveness can be no less an afront to those values we characterize as 'due process' than judicial vindictiveness. Pearce would have application if a prosecutor for no valid reason charged a defendant whose first conviction had been set aside, with a more serious offense based upon the same conduct.

This reasoning was elaborated in Sefcheck v. Brewer, 301 F. Supp. 793 (S.D. Iowa, 1969), which this court cited with approval in U.S. ex rel Williams, supra:

> The same principle must apply to all state officials, including the county attorney. Fear that the county attorney may vindictively increase the charge would act to unconstitutionally deter the exercise of the right of appeal or collateral attack as effectively as fear of a vindictive increase in sentence by the court.
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> [O]nce, as here, a conviction has been obtained, even though it may later be voided on appeal or collateral attack, the language and holding of Pearce lead to the inescapable conclusion that the charge may not be increased so as to subject the defendant to greater punishment, unless there is some legally justified, compelling reason for doing so...It is equally unfair to use the great power given to the county attorney to determine what charge a defendant will face to place a defendant in the dilemma for making an unfree choice as to whether to appeal or to make a collateral attack. As in Pearce, "the fact remains that neither at the time [the increased charge was filed], nor at any stage in this habeas corpus proceeding, has the State offered any reason or justification for that [increased charge] beyond the naked power to impose it." 395 U.S. at 726, 89 S.Ct. at 2081. It is clear from the above discussion that the sentence imposed by the Story County District Court must be set aside as void.

What happened here was, in any realistic sense, nothing more than an increase in the charges. In the first place, the instant indictment, alleging six substantive offenses against defendant, none of which had been alleged in 72 CR. 664 or 72 CR. 1319, required Pacelli to defend against a wide variety of previously undisclosed claims, in a trial in which there were several new co-defendants, a trial infected by the fact that most of the evidence - both testimonial and tangible - dealt with persons, transactions, and times unrelated to him and indeed occurring while he was in jail.

Secondly, if we compare only the substantive offenses for which Pacelli was convicted below, Count 2 (distributing heroin in September, 1971), Count 6 (distributing heroin in November, 1971), with the substantive offenses charged in 72 CR. 664, distributing cocaine in September, 1971 (A. 95), and 72 CR. 1319, distributing cocaine in October, 1971 (A. 97), it becomes clear that the new charges in the present indictment were precluded by Pearce.

The substitution of heroin charges for cocaine charges was prejudicial to defendant in several respects. First, it increased the possibility of a "spillover effect" from the extensive evidence below of heroin activities by Sperling, Conforte and others, and the real evidence of heroin, mix and paraphernalia introduced into evidence below. Second, it increased the possibility of conviction because of the deep community abhorrence of heroin as compared to the sentiment about non-addictive cocaine. That these considerations are not speculative is borne out by the fact that Pacelli was acquitted below on all charges involving cocaine; convicted only on the heroin counts.

Had the Government retried the substantive charges in the earlier indictments, it is plain that no conviction could have been obtained.

The single substantive charge against defendant in 72 CR. 664 was that he and Lipsky had distributed cocaine to Luis Valentine in September, 1971 (A. 95). This was the Yellowfingers incident brought out by the defense below (346, 1458). Conviction was precluded by the fact that Lipsky's testimony would have been refuted by that of surveilling police officers.

The single substantive charge in 72 CR. 1319 was an allegation that Lipsky and Nicholas Lugo distributed cocaine in October, 1971 (A. 95). The evidence supporting this allegation was introduced below, even though it was not charged. It consisted of proof that Lugo had sold cocaine to an agent (612) and Lipsky's uncorroborated claim that Pacelli had told him in advance that the sale was going to occur.

The relevant principle of Pearce, Williams, and Sefcheck is that when a defendant succeeds in overturning a conviction or getting a mistrial, the Government is precluded by the Due Process Clause from reindicting on different charges in the absence of a justification which negates the possibility that the new charges are motivated by a desire to obtain a tactical advantage from the new charges or otherwise to penalize the defendant for seeking the relief he obtained. Where, as here, the suspicion of retribution is overwhelming, such a showing should be clear and compelling. Though challenged by pre-trial (A. 78) and post-trial (A. 169) motions to supply a justification for the new charges, the Government offered none whatsoever.

B. Double Jeopardy

Indictment and trial of defendant on the heroin charges also violates the Double Jeopardy Clause, notwithstanding the technical distinctness of

these offenses and those in the earlier indictments.

What Mr. Justice Brennan said in a separate opinion in Abbate v. United States, 369 U.S. 187 (1959) is apt:

> Obviously separate prosecutions of the same criminal conduct can be far more effectively used by a prosecutor to harass and accused than can the imposition of consecutive sentences for various aspects of that conduct. It is always within the discretion of the trial judge whether to impose consecutive or concurrent sentences, whereas, unless the Fifth Amendment applies, it would be solely within the prosecutor's discretion to bring successive prosecutions based on the same acts, thereby requiring the accused to defend himself more than once. Furthermore, separate prosecutions, unlike multiple punishments based on one trial, raise the possibility of an accused acquitted by one jury being subsequently convicted by another for essentially the same conduct. See Hoag v. New Jersey, supra; cf. Ciucci v. Illinois, 356 U.S. 571. Thus to permit the Government statutorily to multiply the number of offenses resulting from the same acts, and to allow successive prosecutions of the several offenses rather than merely the imposition of consecutive sentences after one trial of those offenses, would enable the Government to "wear the accused out by a multitude of cases with accumulated trials." Palko v. Connecticut, 302 U.S. 319, 328. Repetitive harassment in such a manner goes to the heart of the Fifth Amendment protection. This protection cannot be thwarted either by the "same evidence" test or because the conduct offends different federal statutes protecting different federal interests. The prime consideration is the protection of the accused from the harassment of successive prosecutions, and not the justification for or policy behind the statutes violated by the accused. If the same acts violate different federal statutes protecting separate federal interests those interests can be adequately protected at a single trial ...

As this Court said in United States v. Sabella, 272 F.2d 206, 212 (2d Cir. 1959):

> The Fifth Amendment guarantees that when the government has proceeded to judgment on a certain fact situation, there can be no further prosecution of that fact situation alone: The defendant may not later be tried again on that same fact situation, where no significant additional fact need be proved, even though he be charged under a different statute...It may not have a succession of trials seriatim.

Certainly, therefore, if jeopardy attached in any of the three prior trials where Lipsky was the chief witness, i.e., in 72 CR. 664, 72 CR. 1319, or

73 CR. 441 (Sperling), the Double Jeopardy Clause precludes the prosecution of the substantive charges below.[9] Count 6 here is identical to Count 9 in 73 CR. 441. Counts 2 and 6 here relate to events in September and November, 1971 while the counts in 72 CR. 664 related to September, 1971, and that in 72 CR. 1319 related to October, 1971. The time frames were therefore virtually identical.

The non-waiver of former jeopardy with respect to the Sperling trial, 73 CR. 441, has already been explored. If, however, jeopardy was waived there, the present charges are still precluded if jeopardy was not waived in either 72 CR. 664 or 72 CR. 1319.

In 72 CR. 1319, defendant's third trial, the perjury of Lipsky in both 72 CR. 664 and 1319 was exposed (A. 82). After three days of negotiations, defendant consented to a mistrial, on certain specified conditions, which were made a part of the record (A. 83). The fair import of that agreement was that defendant could be retried only on the same indictment or on an indictment which consolidated 72 CR. 664 and 72 CR. 1319 (A. 121). As defendant swore below, he understood this agreement to mean "that no new counts would be added and there would be no new indictments based upon information then available to the Government" (A. 83).

The Government did not respond to these claims, made in defendant's pre-trial motion to dismiss, apart from arguing about the meaning of the transcript (A. 140), and no hearing was held. After trial, where the agreement was relevant to sentencing, defendant argued that an evidentiary hearing should be held (A. 185). None was. Apart from the subjective understandings of the participants, however, the four corners of the agreement, read in

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9 Although the substantive charges in defendant's first indictment, 71 CR. 614 are similar in nature, circumstance and time to those here, the Government has a justification for not including the present charges in the first indictment, namely, that Lipsky was not yet a cooperating witness and his evidence was not then available. Defendant therefore presses no Double Jeopardy claim with respect to the substantive offenses in reliance upon the jeopardy of his first trial.

context, make plain that defendant's consent was conditional and that his indictment and trial in the present case was a violation of that consent. Given the fact that Lipsky had been caught committing perjury in front of the jury (A. 418 - 421), it is clear that had 72 CR. 1319 gone to verdict, there would have been an acquittal. No mistrial could have been declared without defendant's consent. He could be denied his not guilty verdict only if he expressly consented. Patently, he would not have consented had the Government intimated, or had he or his attorney considered it possible, that the Government would bring up new charges, try him with new defendants, and accuse him of conspiring with all manner of persons he had no association with or knowledge of - all based on Barry Lipsky . Defendant's indictment and trial in 73 CR. 441 and in the present case were therefore blatant violations of the conditions of defendant's consent, rendering his consent nugatory. Put another way, if the Government intended to bring new charges at the time it obtained defendant's consent to a mistrial in 72 CR. 1319, it got his consent by fraud. Since the consent was a nullity, defendant's jeopardy in 72 CR. 1319 bars prosecution of the charges below.

Furthermore, defendant was induced to move to set aside his conviction in 72 CR. 664, by the foregoing agreement, and by misrepresentation. Subsequent to the mistrial in 72 CR. 1319, the Government asked this court to remand 72 CR. 664. Then, in March, 1973, the defendants moved to set aside the conviction (A. 129). It was plain, however, that, so far as defendant was concerned, his motion was predicated upon the Government's representation, made in 72 CR. 1319, that if 72 CR. 664 were vacated, the Government would

have "the option of including in that retrial 72 CR. 1319. In other words, those two indictments would either be consolidated or a superseding indictment encompassing the crimes charged in both indictments would be filed and that case would be tried as one" (A. 124). This agreement was not kept. Moreover, in the very proceeding in which the defendant moved to set aside the conviction, the Court was told by the Government that "the government intends to prosecute the same indictment" (A. 135). Instead, defendant was indicted less than six weeks later, on 73 CR. 441, on an indictment wholly different in scope, parties, number of charges, length and complexity of trial, and procedural disadvantage to the defendant (A. 84).

The solemn agreements the Government made are plainly enforceable. If not, the defendant's waivers of jeopardy in 72 CR. 664 and 72 CR. 1319 are nullities. Cf. Santobello v. New York, 404 U.S. 257 (1971).

C. Elementary fairness and speedy trial

Apart from Pearce, apart from Double Jeopardy, the substantive charges are barred by elementary fairness and efficient judicial administration. The Government had the evidence on these charges since March, 1972. It indicted and tried defendant three times since then (72 Cr. 664, 72 CR. 1319, 73 CR. 105) before charging him with Count 6 in April, 1973 (73 CR. 441). It indicted and tried him four times before charging him with Count 2, in the present indictment, brought in September, 1973, a year and a half after Lipsky gave the Government its evidence. In the absence of strong justification (e.g., the absence of evidence), failure to join offenses which could be joined in an indictment bars subsequent prosecution. See A.L.I. Model Penal Code §1.08(2), 1.10; A.B.A. Standards Relating to Joinder and Severance

(Approved Draft, 1968) §1.3(c). See also, Petite v. United States, 361 U.S. 529 (1960).

The failure to include these charges in the earlier indictments not only precludes prosecution because of considerations of efficient judicial administration, and fairness to the defendant, it denies him speedy prosecution. As was so aptly said in Sanchez v. United States, 341 F.2d 225 (9th Cir. 1965);

> "exposure of an accused to a succession of trials...for the deliberate purpose of enhancing the chance of conviction on weak evidence might well constitute fundamental unfairness...and delays for such purpose might well be unreasonable under both the Sixth Amendment and Rule 48(b), no matter how short in duration."

Assuming arguendo that jeopardy was fully, completely and unconditionally waived in each of the prior trials (72 CR. 664, 72 CR. 1319, 73 CR. 441) it is still grossly unfair to have conjured up these new charges. The charges of heroin distribution were stale. Lipsky claimed to have observed and participated in these events with Pacelli more than three years prior to trial. He was unable or unwilling even to pin down the month in which they occurred (87, 118, 124, 362).[10] It was therefore impossible for defendant to counter his claims with an alibi or with witnesses having different recollections of events in the summer and fall of 1971. The delay in prosecuting defendant on these charges was therefore prejudicial and entirely unwarranted by any considerations of investigative or prosecutorial efficiency. Cf. Ross v. United States, 349 F.2d 210 (D.C. Cir. 1965); United States v. Sanchez,

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10 The bill of particulars refused to confine most of the transactions even to a specific month (A. 7).

361 F.2d 824 (2d Cir.1966). It is improper for the prosecution to delay "to gain some tactical advantage over [defendants] or to harass them." United States v. Marion, 404 U.S. 307, 325 (1971). See also, Barker v. Wingo, 407 U.S. 514, 531 (1972). That is clearly what happened in this case.

Point II

THE COURT'S REFUSAL TO PERMIT (1) FULL CROSS-EXAMINATION OF CONFORTE, (2) PLAYING OF THE TAPE OF CONFORTE'S SHAKEDOWN OF SAM KAPLAN, OR (3) PROOF THAT CONFORTE'S CALL COULD NOT HAVE BEEN MADE ON JACK SPADA'S BEHALF, WAS PREJUDICIAL ERROR.

After first denying that he had spoken with Sam Kaplan (773), an alleged co-conspirator acquitted in the Sperling trial (73 CR. 441), Joseph Conforte admitted telephoning Kaplan on October 28, 1973, and urging him to pay an unidentified person $10,000 to keep himself from being implicated in the narcotics investigation then taking place (779). Conforte claimed that in calling Kaplan, he was merely doing Kaplan a favor (784), was a "messenger boy between Jack Spada and Sammy Kaplan" (783). He denied that he sought any of Kaplan's money for himself (836-7). He further testified that he reported to Spada, about a week and a half later, that Kaplan didn't have the money (874).

The defense sought to prove that Conforte's version of the event was perjurious, and that in fact Conforte made the call to Kaplan on his own in an effort to extort money for himself and tailor his testimony accordingly.

The defense sought first to introduce the tape recording of the telephone conversation. As counsel for defendant Pacelli argued, the tape itself would clearly have given the lie to Conforte's claim that he was merely a messenger boy (818), as indeed it would have (M.A. 1783).* The tape was excluded (810). This avenue having been blocked, counsel sought to elicit facts from Conforte which would disprove his claim of agency. For example, counsel asked if Jack Spada was ever in a mental institution. Conforte answered in the negative

* Reference is to Appellant Mallah's Appendix.

(854). Counsel then asked Conforte if he had not told Kaplan, in the telephone conversation, that the man wanting the money "was in the nut house" (as Conforte had described him to Kaplan (M.A. 1804)). Objection was sustained (A. 854). Although permitting cross-examination on the Kaplan call, the court frequently refused to permit the defense to inquire about assertions made by Conforte in the phone call (eg 854, 857, 869), on the ground the entire matter was "collateral." In other instances, Conforte equivocated or denied that he had made statements which were on the tape (790, 792, 826, 829, 831, 832), and the defense was stuck with his answers. The court even refused to direct Conforte to read the transcript to refresh his recollection (877, 879).

On redirect, the Government was then permitted over objection to elicit from Conforte various things he had said to Kaplan in the phone conversation which, taken from context, tended to rehabilitate Conforte (961-964).[11]

As part of its own case, the defense then sought to prove that the Conforte-Kaplan conversation occured on October 28, 1973, that Spada was dead on that date, and that Conforte could therefore not have spoken to Spada on that day or thereafter. This proof was precluded (1317, 1320).

Had the defense been permitted fully to cross-examine Conforte about his conversation with Kaplan, or had it been permitted to introduce the tape, or had it been permitted to prove the date of Spada's death, Conforte would then have been exposed as a man willing either to frame an innocent person

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11 Defendant Pacelli objected to the questions on redirect on the ground they "are taken from a context (Defense Exhibit Q and Q1) which the defense has been partially precluded from exploring or offering into evidence, with the result that the jury is mislead. Specifically, the meaning of Conforte's statements must be gleaned from a context in which Conforte was seeking a bribe. The jury might reasonably infer from the entire context that Conforte meant that he, Conforte, would frame Kaplan." Courts Exhibit 16.

in the very conspiracy on trial, or to commit perjury on behalf of a co-conspirator willing to pay for the perjury. Instead, he was permitted by the court's ruling and his own perjury to fob himself off as a truthful "messenger boy."

With respect to the curtailment of cross-examination, including asking Conforte about the statements he made on the tape, wide latitude should have been permitted, even on matters clearly "collateral." As Judge Friendly said for the Court in United States v. Barash, 365 F. 2d 395 (2d Cir. 1966), concerning the use of taped conversations,

> "[I]mpeachment as to prior inconsistent statements is proper even with respect to 'collateral' matters 'which the witness has testified to on direct or cross.' McCormick, Evidence § 36; 3 Wigmore, Evidence § 1023. For the defense to establish that [the Government witness] has lied about making threats would have an importance transcending that particular issue; the jury might well have concluded that, having lied on one subject, he had lied on all." Id at 401

Assuming arguendo, moreover, that playing of the tape to Conforte was "extrinsic" evidence,[12] it is plain that such evidence was not "collateral." Bias is never collateral, United States v. Lester, 248 F. 2d 329, 334 (2d Cir. 1957); United States v. Haggett, 438 F. 2d, 396, 399 (2d Cir. 1971); United States v. Blackwood, 456 F. 2d 526, 530 (2d Cir. 1972), and a proven willingness

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12 In Barash, where the court found reversible error in the trial court's curtailment of impeachment on the basis of tape-recordings of the witness' conversation, the tape-recordings were regarded by the court as part of cross-examination rather than "extrinsic" and therefore not subject to the restrictions on collateral proof. 365 F. 2d at 401. This seems clearly correct. "Extrinsic" evidence is evidence offered through another witness, as part of the cross-examiner's case. McCormick, Evidence (2d ed. 1972) p. 67. Playing the tape to Conforte was merely a confrontation of him with his own prior statements, a conventional and wholly proper method of cross-examination. Id. at 67-71. Indeed, the cross-examiner is customarily permitted to inquire "about any previous statements inconsistent with assertions, relevant or irrelevant, which the witness has testified to on direct or cross. At this stage, there is no strict requirement that the previous impeaching statements must not deal with 'collateral matters.'" Id. at 70. In precluding the defense from playing the tape, which constituted a prior inconsistent statement, the trial judge was in error in considering it "collateral."

to give perjurious testimony about the very matters on trial is evidence of bias, for it indicates the witness' feelings and leanings as between the prosecution and the defense, Ewing v. United States, 135 F. 2d 653 (D.C. Cir. 1942), and demonstrates a specific, focused disregard for the oath and a poised proclivity to swear to anything which may have a personal payoff. "A willingness to swear falsely is, beyond any question, admissible as negativing the presence of that sense of moral duty to speak truly which is at the foundation of the theory of testimonial evidence." 3A Wigmore on Evidence (Chadbourn Rev. 1970) 803. "An offer to testify corruptly should stand on the same footing..." Id at 804. Moreover, the "prohibition of extrinsic testimony does not apply [to] qualities of bias, corruption, and interest - all being merely varieties of the single quality of emotional partiality." Id at 778. In analogyzing the cross-examination and extrinsic proof concerning Conforte's shakedown of Kaplan to the proof of prior crimes (804), the court was therefore clearly in error.

The function of the limitations on extrinsic proof of "collateral" matters is to save time and avoid confusion. 3A Wigmore supra, at 826. The court's refusal to permit playing of the tape or proof of Spada's death accomplished neither purpose. On the contrary, it compelled the defense to wallow around for half a day on cross, amid a flurry of objections, and deprived the jury of clear, potent and easily understood evidence of Conforte's bias and perjury.

There is no talisman to determine what is "collateral." Its meaning depends ultimately on a balancing of materiality against its counterweights, time consumption and confusion. Plainly, the excluded evidence would have been devastating to Conforte; would have cast doubt on all of his testimony and

undermined the Government's entire case. The common sense of the matter therefore precludes its being considered "collateral."

The foregoing errors, which permitted Conforte to appear as a truthful witness, infected the entire trial. Conforte was the principal witness to the extensive narcotics activities of Sperling and Mileto, (647-672, 690-764), and testified to their presence and conspiratorial activity at Sperling's apartment on Spring Street (655, 699), and around the Ballentine Barbershop (661, 698, 711, 717, 720, 723, 730). He therefore corroborated Lipsky's testimony linking Pacelli with Sperling and Mileto. Had the court permitted his impeachment on the Kaplan matter, it is likely that all defendants would have been acquitted. It is relatively certain, in any event, that Pacelli, who was acquitted by the jury on three counts, would have been acquitted on all.

Point III

THE PROSECUTOR'S REMARKS IN SUMMATION DEPRIVED DEFENDANT OF A FAIR TRIAL

Defendant Pacelli elicited evidence through Lipsky that he had testified "on a prior occasion in court" that he and Pacelli had a narcotics transaction with Luis Valentine at Yellowfingers in late September, 1971 (346). Lipsky had testified that he and Pacelli had dinner there and that he left Pacelli there while he went to his apartment, got some cocaine, and returned (346-347). The reported testimony of a police officer was then offered as part of Pacelli's defense, which showed that while the officer observed Lipsky and Valentine during the entire episode, Pacelli was nowhere in sight (1458). Counsel then argued that Lipsky had not told that story here because he now knew he could be contradicted by police officers (1518-20).

In response, Mr. Lavin, told the jury:

> I recall Mr. Duke told you on one occasion that he read some testimony yesterday into the record that was about a surveillance of a Valentine buy at the Yellowfingers Cafe, and he read the whole thing, and he said his conclusion was that Mr. Lipsky did not testify about that at this trial because he had found out that he was under surveillance.
>
> Well, the reason that he didn't testify about it at that trial was that those persons were already convicted, as Mr. Duke well knew, and there was no reason to testify. (1602)

This remark was not only outside the record, it was erroneous. If Lipsky's story were true and credible, it would have buttressed his testimony in the present trial and would plainly have been admissible. Thus, Mr. Lavin's claim that "there was no reason to testify" here was untrue.

Apart from being outside the record and untrue, however, the remarks were blatantly improper and prejudicial. In assigning as Lipsky's reasons for not telling the story that "those persons were already convicted, as Mr. Duke

well knew," the prosecutor deliberately and improperly sought to bolster Lipsky's testimony with the inference that another tribunal had believed his Yellowfinger story beyond a reasonable doubt.

The prejudice and impropriety did not end there, however. In turning to defendant Pacelli's counsel and saying, "those persons were already convicted, as Mr. Duke well knew," the prosecutor wafted the innuendo, whether or not intentionally, that defendant Pacelli's counsel had been involved in the trial where "those persons...were convicted." The suggestion was implicit, therefore, that Pacelli himself had been "already convicted" in the Yellowfingers transaction, on Lipsky's testimony.[13]

All defendants promptly objected to Mr. Lavin's remarks (1602) and defendants Pacelli, DeFranco, and Barret moved for a mistrial (Cts. Ex. 53), which was denied (1604). The court's corrective efforts were timely and forceful (1602), but they plainly could not have eliminated the implanted suggestions.

The remarks here were clearly more deliberate, more improper, and more prejudicial than those requiring reversal in United States v. Gonzales, 488 F. 2d 833 (2d Cir. 1973). And while they were not as numerous as those condemned in United States v. Drumond, 481 F. 2d 62 (2d Cir.1962), it cannot be said that they were less prejudicial. Nor, in view of defendant's acquittal on three counts, is this a case like United States v. Benter, 457 F. 2d 1174 (2d Cir. 1972), where improper remarks were held insufficient for reversal because proof of guilt was overwhelming. Id at 1178. Reversal is plainly required.

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13 The suggestion may have drawn some strength form the fact that defendant Pacelli did not testify whereas defendant Mallah, who did, was impeached by a prior conviction (1418), thus feeding the surmise that Pacelli was not testifying because he was already convicted on the Yellowfinger transaction.

Point IV

PURSUANT TO RULE 28(i) FEDERAL RULES OF APPELLATE PROCEDURE, APPELLANT PACELLI ADOPTS THE POINTS AND ARGUMENTS OF CO-APPELLANTS INSOFAR AS THEY APPLY TO HIM.

CONCLUSION

The judgment below should be reversed with directions to dismiss. Alternatively, the case chould be remanded for a new trial.

Respectfully submitted,

Steven B. Duke
Attorney for Appellant Pacelli

CERTIFICATE OF SERVICE

I, Steven Duke, a member of the bar of the Court, served a copy of Appellant Pacelli's brief and his appendix on the Appellee by mailing same to Paul Curran, United States Attorney, Southern District of New York, Federal Court House, Foley Square, New York, N.Y., first class, on June 5, 1974.

Steven Duke

Steven Duke